

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT RANDALL GILBERT,

Defendant and Appellant.

C058630

(Super. Ct. No.  
CM025273)

A jury convicted defendant Scott Randall Gilbert of two counts of kidnapping (Pen. Code, § 207, subd. (a))<sup>1</sup> and found he personally used a deadly weapon in both offenses (§ 12022, subd. (b)(1)). In a bifurcated proceeding, the court found defendant's two prior convictions for assault with a tree branch were serious felony convictions under the "Three Strikes" law and sustained an allegation of a prior serious felony

---

<sup>1</sup> Subsequent undesignated statutory references are to the Penal Code.

conviction. Defendant was sentenced to 31 years to life in prison.

On appeal, defendant contends insufficient evidence supports the court's strike findings. We affirm.

#### BACKGROUND

We briefly summarize the facts of defendant's crimes, which are unnecessary to resolve this appeal.

Defendant met Susan Thompson in Chico shortly after his release from prison. Three days later, defendant pulled a knife on Thompson's boyfriend Wade Stafford and forced him to call Thompson and arrange for her to pick them up. After she picked them up, defendant let her to go back to her trailer to get her purse. He then pulled out a knife and ordered her to drive to Redding on Interstate 5.

Thompson eventually answered a cell phone call and told Stafford's mother they had been kidnapped. Defendant allowed Thompson to drive back to Chico, and he was arrested near Thompson's trailer.

#### DISCUSSION

Defendant's sole contention is the evidence does not support the trial court's finding that his two 1992 convictions for assault in violation of section 245, subdivision (a)(1) both qualify as prior serious felonies within the meaning of the Three Strikes law.

At the trial on the strike allegations, the People introduced a copy of the information filed in Butte County in 1992 charging defendant in count 1 as follows: "On or about

June 5, 1992, in the above named Judicial District, the crime of ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245, (a) (1), a Felony, was committed by [defendant], who did willfully and unlawfully commit an assault upon [the victim] with a deadly weapon, to wit, a tree branch, and by means of force likely to produce great bodily injury." In count 2, defendant was charged with the same crime in the same language, but with a different victim. The complaint also alleged great bodily injury (§ 12022.7) and hate crime (§ 422.75) enhancements for both counts.

The next item of evidence was the change of plea form. The form shows defendant entered a no contest plea to two counts of violating section 245, subdivision (a) (1), the hate crime enhancement in count 1, and counts in other cases, in exchange for dismissing the remaining charges. The plea form included an advisement initialed by defendant that he could be subject to "SERIOUS FELONY PRIOR/PRISON PRIOR" as a consequence of the plea. Defendant also initialed a *Harvey*<sup>2</sup> waiver as part of the plea form.

The minute order for sentencing on the prior assault convictions was also introduced. It describes the two assault counts as "Assault GBI w/DW." The trial court imposed an upper term for both counts, with the minute order listing the following aggravating factors: "injuries, serious injuries with

---

<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

deadly weapon, crimes of violence, serious danger to public, on Court probation at time of incidents, prior performance unsatisfactory."

The abstract of judgment for the prior offenses described the two assault convictions as "Assault GBI w/DW" with upper terms for both counts. Finally, the People introduced the record of defendant's prison commitment for the prior assault convictions.

The court sustained the strike allegations, finding the two prior convictions were for assault with a deadly weapon and therefore serious felonies and strikes under section 1192, subdivision (c) (31).

Defendant argues the charging document, plea agreement abstract of judgment, and the description of the offenses in the minutes are ambiguous as to whether the assault convictions were for assault with a deadly weapon or assault by means likely to produce a great bodily injury. He also asserts the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455] (*Apprendi*) and California law preclude consideration of the sentencing factors used by the previous court to impose the upper term. We disagree.

A prior conviction counts as a strike if it is listed as a serious felony under section 1192.7, subdivision (c).

"[A]ssault with a deadly weapon . . . in violation of Section 245" counts as a serious felony for this purpose, without regard to whether the defendant personally used the deadly weapon.

(§ 1192.7, subd. (c) (31); *People v. Luna* (2003) 113 Cal.App.4th

395, 398, disapproved on other grounds in *People v. Delgado* (2008) 43 Cal.4th 1059, 1070, fn. 4.) The other part of section 245, subdivision (a)(1), assault "by any means of force likely to produce great bodily injury," does not count as a serious felony unless it also involves the use of a deadly weapon or results in the personal infliction of great bodily injury. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 605 (*Banuelos*).)

In a court trial of a prior, the trial court may look to the entire record of conviction to determine the nature of the prior offense. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262; *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356.) In doing so, the court may look to the charging instrument so far as it shows the allegations the defendant subsequently admitted by plea. (*People v. Reed* (1996) 13 Cal.4th 217, 224; *People v. Guerrero, supra*, 44 Cal.3d at pp. 345, 356.)

The information in the prior case charged in both counts that defendant committed "ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245, (a)(1)" against his victims "with a deadly weapon, to wit, a tree branch, and by means of force likely to produce great bodily injury." The use of the conjunctive in an information charging a violation of section 245, subdivision (a)(1), when the statute uses the disjunctive in defining the crime, has been found to charge "only the single act of assault with a deadly weapon." (*People v. Flynn* (1995) 31 Cal.App.4th 1387, 1394.) "In such instance the phrase 'by means of force likely to produce great bodily injury' simply describes the manner in which the weapon

is used and serves to explain why it thereby constitutes a deadly weapon." (*Ibid.*) Defendant pled no contest to both counts. As stated in *People v. Hayes* (1992) 6 Cal.App.4th 616, 623: "[W]here a defendant enters a guilty plea constituting his voluntary admission he committed the acts alleged in the indictment, such plea unequivocally establishes the particular elements alleged *were both raised and resolved.*" (Original italics; accord, *People v. Davis* (1996) 42 Cal.App.4th 806, 814.)

Defendant argues to the contrary, citing *Banuelos, supra*, 130 Cal.App.4th 60. *Banuelos* held that a guilty plea to an offense described in the abstract of judgment and a fingerprint card as "'ASSAULT GBI W/DEADLY WEAPON or "'CT1 PC245(A)(1) ASSLT GRT BDLY INJ W/DDLY WPN'" was not proved to be a serious felony because "[t]hese documents are completely silent on the question of whether appellant *personally* used a deadly weapon or *personally* inflicted great bodily injury . . . ." (*Banuelos, supra*, 130 Cal.App.4th at p. 605, original italics.) The Court of Appeal in *Banuelos* reasoned that the documents' reference to both aspects of section 245, subdivision (a)(1), was inherently ambiguous and could not be taken to prove that the defendant committed the form of assault covered by the Three Strikes law. (*Banuelos, supra*, at pp. 606-607.) However, *Banuelos* is distinguishable; so far as the opinion shows, the prosecution did not proffer the information, plea form, and minutes, as in our case, but only the abstract of judgment and fingerprint card. (*Id.* at p. 606.)

Nor do we accept defendant's contention that his plea is only an admission to the least serious form of the offense. It is true that "if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.]" (*People v. Miles* (2008) 43 Cal.4th 1074, 1083.) This presumption is inapplicable because the information establishes defendant's prior convictions were for assault with a deadly weapon.

The sentencing minutes also supports the court's finding. The aggravating factors used by the prior trial court in imposing the upper term for the assaults, specifically, that the assaults involved serious injuries with a deadly weapon, is further proof that defendant was convicted of assault with a deadly weapon.

We reject defendant's contention that the rule of *Apprendi* precludes consideration of the prior court's statement of reasons for imposing the upper term. *Apprendi*, which was decided long after defendant's prior convictions, did not apply to his upper term sentences for the assault counts. (See *In re Consiglio* (2005) 128 Cal.App.4th 511, 515-516 [*Apprendi* does not apply retroactively to cases that are already final]; *Curtis v. United States* (7th Cir. 2002) 294 F.3d 841, 842 [unanimous rule that *Apprendi* does not apply retroactively on federal habeas corpus].) Nor did the trial on the strike allegations violate *Apprendi*; defendant waived his right to a jury trial on the

strikes and the court's findings on the strike allegations applied the beyond a reasonable doubt standard.

Although the aggravating factors in the prior conviction were found under a preponderance standard, this does not preclude the present trial court from using them as evidence of the nature of defendant's prior convictions. This was not, as defendant contends, an improper use of collateral estoppel, but simply one piece of evidence relied on by the trial court. While it is possible the previous trial court relied on the probation report in finding the aggravating circumstance, the present court did not, relying only on the record of the prior conviction -- the information, the plea form, the minutes, and the abstract. Defendant's reliance on *People v. Reed, supra*, 13 Cal.4th at pages 230-231, which involved the use of a probation report in determining the nature of a prior conviction, is misplaced.

We conclude the court's strike findings are supported by substantial evidence.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_  
NICHOLSON, J.

We concur:

\_\_\_\_\_  
BLEASE, Acting P. J.

\_\_\_\_\_  
CANTIL-SAKAUYE, J.